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More than thirty states, as well as numerous local school districts, have adopted some form of student minimum competency program. Such programs vary widely in their purposes which range all the way from instructional and curriculum planning to deciding whether students are promoted from grade to grade. Thus far, there has been little actual litigation over using minimum competency test scores to decide who gets a diploma. This is, however, mainly due to the fact that such programs were only recently conceived and few of them have come to the stage in their implementation where students have actually been denied diplomas on the basis of test scores. Oregon, for instance, which was one of the pioneers of the minimum competency movement, will not be faced with denying diplomas for lack of demonstrated competency until 1984. In this paper, data and analyses will be presented on each of the five major, legal problems that stem from minimum competency graduation programs; i.e., educational malpractice, racial discrimination, adequate prior notice, psychometric properties of the tests, and the match between the tests and instruction. (Author)

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MINIMUM COMPETENCY GRADUATION TESTING PROGRAMS AND THE LAW

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ABSTRACT

More than thirty states, as well as numerous local school districts, have adopted some form of student minimum competency program. Such programs vary widely in their purposes which range all the way from instructional and curriculum planning to deciding whether students are promoted from grade to grade. Thus far, there has been little actual litigation over using minimum competency test scores to decide who gets a diploma. This is, however, mainly due to the fact that such programs were only recently conceived and few of them have come to the stage in their implementation where students have actually been denied diplomas on the basis of test scores. Oregon, for instance, which was one of the pioneers of the minimum competency movement, will not be faced with denying diplomas for lack of demonstrated competency until 1984. In this paper, data and analyses will be presented on each of the five major, legal problems that stem from minimum competency graduation programs; i.e., educational malpractice, racial discrimination, adequate prior notice, psychometric properties of the tests, and the match between the tests and instruction.

INTRODUCTION

The minimum competency movement has arisen in response to the growing loss of citizen confidence in the quality and results of public schooling, at the same time as the cost of education has soared from 10 billion dollars in 1950 to nearly 200 billion dollars at present. A recent Gallup Poll indicated that the American public (by a 2 to 1 majority) believes the quality of education is declining and that 2 out of every 3 Americans now favor a national standardized competency test for prospective high school graduates. This loss of faith in the educational system in the face of rising costs has, in general, led to the widespread public press for "accountability" and for a return to "the basics," and in particular, has led to the minimum competency movement as a potential means to restore the confidence of the public in elementary and secondary education.

More than thirty states, as well as numerous local school districts, have adopted some form of student minimum competency program. Such programs vary widely in their purposes which range all the way from instructional and curriculum planning to deciding whether students are promoted from grade to grade.

The most common and controversial form of minimum competency program involves the setting of minimum standards of basic skills achievement and requiring students to obtain passing scores on paper and pencil tests of these skills as a condition for graduation from high school with a standard diploma. Such programs raise legal issues stemming from six categories of provisions, according to Paul Tractenberg. Three are constitutional in origin: federal and state due process clauses; federal and state equal protection clauses; and

state education clauses. The fourth is statutory -- those provisions of the state's education laws which directly or indirectly bear upon the establishment and operation of a minimum competency testing program. The fifth is regulatory -- relevant policies, rules and regulations of the state education authorities. The sixth is the "common law" -- legal principles that have evolved through litigation. Such questions may have special bearing on minority children, on students with little or no skill in standard English, and handicapped pupils.

Thus far, there has been little actual litigation over using minimum competency test scores to decide who gets a diploma. This is, however, mainly due to the fact that such programs were only recently conceived and few of them have come to the stage in their implementation where students have actually been denied diplomas on the basis of test scores. Oregon, for instance, which was one of the pioneers of the minimum competency movement, will not be faced with denying diplomas for lack of demonstrated competency until 1984.[1] In this paper, data and analyses will be presented on each of the five major, legal problems that stem from minimum competency graduation programs; i.e., educational malpractice, racial discrimination, adequate prior notice, psychometric properties of the tests, and the match between the tests and instruction.

EDUCATIONAL MALPRACTICE

The first wave of litigation related to the minimum competency testing movement largely preceded it and helped to bring it about. Its essence was the spate of educational malpractice suits that sprang up in the mid and late

seventies. In these actions, parents and students charged school systems with failing in their duty by granting diplomas to students who were functionally illiterate.

In accord with the powerful weight of legal authority and precedence supporting the right of boards of education to exercise wide descretionary power in establishing policies and procedures for the retention, demotion, promotion and graduation of pupils, none of these court rulings to date have been in favor of the plaintiffs.[2] The wide publicity such malpractice suits received, however, further eroded the public's confidence in their schools and fostered the adoption of minimum competencies and tests to certify their attainment.

Now, however, that standards and measures of "competency" are coming into widespread use with their implied or explicit guarantees of functional literacy, a second, and perhaps more succesful set of malpractice suits could be filed on behalf of students who pass the tests but do not succeed in the workplace or in later education or by students who fail the test but do not feel that the school system's remedial efforts to help them pass were adequate.

The theory underlying such cases is that if a state or local school district establishes minimum competency standards, it thereby obligates itself to ensure that at least all "educable" students perform at or above these levels and that students who fail to achieve such levels have legally enforceable rights against the education system and its officials.

The current rulings in more recent educational malpractice cases continue, however, to be consistent with the earlier ones in denying the plaintiffs'

claims and thus give little encouragement to such actions. In a recent case reported in the March 16, 1981 edition of Legislature Review, the Court of Special Appeals in Maryland ruled last February that the Montgomery County School Board and three of its teachers were not liable to a student for educational malpractice. The Maryland Court feared that allowing such suits would involve the Court in deciding not only educational policies but also the implementation of these policies. The court further stated that an educational malpractice suit might arise "everytime a child failed a grade, subject, or test, with the result that teachers could possibly spend more time in lawyers' offices and courtrooms than in the classroom." The Court further noted there were administrative procedures available to parents and students in such cases. Thus, the Maryland Court's findings were in agreement with those of other courts around the country which have consistently ruled that educational malfeasance could not be settled by any justifiable standards or that public policy prevented such suits.

RACIAL DISCRIMINATION

Attorney Merle McClung has noted that some competency testing programs may face legal challenges under the HEW regulations implementing Title VI of the Civil Rights Act of 1964. These regulations prohibit "practices that have the effect of discriminating against individuals on the ground of race, color, or national origin." As McClung notes, "There is some evidence that a disproportionate percentage of Black and Hispanic students will be adversely affected by the competency test requirement." If the test is also culturally or linguistically biased (i.e., is based upon and assumes a white middle class background) the Title VI claim is even stronger.

Some black parents in desegregated communities see a racial motive behind competency testing. They say that competency testing was not a concern at either black or white schools until the schools in their district were desegregated, at which time competency testing was introduced "to protect standards." The effect can be resegregation within the school according to test results (or other forms of tracking), since unequal educational opportunities may cause black children to score lower than their white counterparts.

Whether or not a racial motive is involved, such practices are arguably unconstitutional in formerly segregated districts. In such situations, the federal courts have held that practices which carry forward the effects of prior racial discrimination are prohibited. For example, the U.S. Supreme Court in Gaston County, N.C. vs. United States, an action brought under the Voting Rights Act of 1965, held that it was appropriate for a court to consider whether a literacy or educational requirement had the effect of denying the right to vote on account of race or color because the State had maintained separate and inferior schools for its black residents who are now of voting age (see also Oregon vs. Mitchell 91s. ct. 260 [1970]). "(We) cannot escape the sad truth that throughout the years, Gaston County systematically deprived its black citizens of the educational opportunities it granted to its white citizens. 'Impartial' administration of the literacy test today would serve only to perpetuate these inequities in a different manner."

Similarly, the Fifth Circuit Court of Appeals developed the standard that the testing necessary for ability grouping could not be applied to black students for the first time in years immediately following desegregation (McNeal vs Tate Court School Dist., 508 F.2d 1017 [5th Cir., 1975]). This "prior

effects" principle arguably applies in other cases of serious injury, such as denial of grade promotion or a high school diploma.

The legal standard to be applied to other school districts (those not recently desegregated or found to be subject to prior discrimination) is less clear. As a constitutional matter, the Supreme Court held in Washington vs. Davis that the disproportionate racial impact of a test (in this case, a police department's personnel test) was not sufficient to establish an unconstitutional racial classification without proof that it reflects a racially discriminatory purpose. The Court, however, stated that such disproportionate racial impact can be evidence of discriminatory purpose.

In a concurring opinion, Justice Stevens noted that "the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical," as the majority's opinion suggested. "Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For, normally, the actor is presumed to have intended the natural consequence of his deeds. Given the studies cited above, the natural consequence of most competency testing programs would be racial differentiation.

In Washington vs. Davis, the Supreme Court also distinguished between the constitutional standard and the Title VII standard on testing, noting that the latter was more stringent since it incorporated an effect rather than a purpose standard. Thus, when a test or practice disqualified substantially disproportionate numbers of blacks in hiring and promotion decisions, the burden under Title VII shifts to the employer to validate the test or practice

in terms of job performance and to show that the test or practice is sufficiently job related.

The HEW regulations implementing Title VI of the Civil Rights Act of 1964 incorporate a similar effect (rather than purpose) standard, prohibiting practices which have the effect of discriminating against individuals on the ground of race, color, or national origin. This Title VI effect standard has been cited with approval and applied by the U.S. Supreme Court in Lau vs. Nichols. The Title VI regulations also incorporate the Gaston County principle against carrying forward the effects of past discrimination, and add to it an affirmative obligation to take steps to remedy those effects.

Application of these Title VI standards to public school testing programs is indicated by an HEW memorandum requiring schools to take steps "to adopt and implement procedures to insure that test materials and other assessment devices used to identify, classify, and place exceptional children are selected and administered in a manner which is non-discriminatory in its impact on children of any race, color, national origin, or sex . . ." Since virtually all public schools are subject to Title VI regulations, competencytesting programs like that in Palm Beach County which have a disproportionate effect on blacks or other protected minorities should be examined in light of Title VI standards, especially where there is evidence of racial bias in the test itself or in the administration of the test.

Where competency testing programs have a disproportionate effect on Hispanic children, attorneys should also examine Lau vs. Nichols and related HEW memoranda requiring public schools to take affirmative steps to remedy the linguistic exclusion of non-English speaking children. The Palm Beach County

school system has indicated that no Spanish translation of their competency test is planned at this time. Even a Spanish translation, however, without corresponding curricular and instructional modification, may not satisfy the HEW standards. Any functional competency test, and the curriculum on which the test is based, should reflect all aspects of a pluralistic society, or at least the extent of diversity reflected by the student population. A functional competency test given in the Miami or San Antonio public schools, for example, should include a number of Hispanic skill and content items, as some cross-cultural competence is arguably necessary for successful functioning as adults in those cities. In any case, a curriculum or competency test which is biased against blacks or Hispanics should be subject to a Title VI challenge.

ADEQUATE PRIOR NOTICE

McClung argues that "traditional notions of due process should require adequate prior notice of any rule that could cause irreparable harm to a person's educational or occupational prospects." Given that the outcomes of minimum competency testing can have important consequences for a student's educational/occupational future, it is imperative that students be aware of the system and its potential influence on their lives. Clearly, giving such notice to students on the verge of completing their schooling is inadequate.

Many competency testing programs are being imposed upon students late in their secondary education with little prior notice. The school system had, in fact, explicitly approved their progress by promoting them each year even though many of them did not have basic skill competencies. All prior classes of

students had been graduated with diplomas without having to satisfy this additional requirement. It is likely that many, if not most, of these students failing the test would have studied (and teachers taught) differently in early years had they been given such notice. The competency test is designed to assure that minimal competency is acquired.

Mahavongsanan vs. Hall (529 F.2d [5th Cir., 1976]) provides some support for the proposition that students must be provided with adequate notice of any significant change in graduation requirements, although the Fifth Circuit found that the plaintiff in that case had not been denied procedural or substantive due process because she received "timely notice" that passing a comprehensive examination would be a prerequisite to a master's degree in education.

The legal argument for adequate notice of significant changes in graduation requirements is stronger in the context of elementary and secondary public schools than in postsecondary education because courts usually apply a stricter standard of review to practices at the elementary and secondary level where education is compulsory. Notice of a competency testing requirement for a high school diploma would have to be much earlier than in the Mahavongsanan case because twelve rather than just two or three years of education are being tested. The plaintiff in Mahavongsanan received notice of the new requirement relatively early in the program (only six months after starting the program), whereas Palm Beach juniors did not receive notice until their tenth year of schooling. Whatever notice is considered adequate in this situation (first grade? fourth grade?), notice after five-sixths of one's educational program is already completed seems clearly inadequate.

PSYCHOMETRIC PROPERTIES OF THE TESTS

The APA (American Psychological Association) Standards define the requirements for reliable and valid tests. Simply put, reliability refers to whether the instrument measures accurately what it measures (for example, the instrument should yield comparable results when used at different times). Validity refers to whether the instrument measures what it purports to measure. There are many different kinds of test validity, as indicated below, and each should be considered in relation to the exact test in question. According to the Standards for Educational and Psychological Tests developed by the American Psychological Association:

> Questions of validity are questions of what may properly be inferred from a test score . . . [primarily] [w]hat can be inferred about what is being measured by the test [and] [w]hat can be inferred about other behavior? . . . The kinds of validity depend upon the kinds of inferences one might wish to draw from test scores. Four interdependent kinds of inferential interpretation are traditionally described to summarize most test use: the criterion-related validities (predictive and concurrent); content validity and construct validity.

Predictive validity is a measure of how well test items predict the future performance of test-takers. This type of assessment requires an analysis comparing the predictions about each test-taker based on the test results with the actual functioning of the test-taker at a later point in time. For example, if a high number of students which an APL test had predicted would be functionally incompetent in fact turned out to be such when studied years later, then the test could be said to have predictive validity.

Concurrent validity is a measure of how well test results correlate with other criteria which might provide the same type of information about test-takers.

This type of assessment provides a measure of a test's immediate predictive validity, or how well determinations based upon test results correlate with other currently available information about test-takers.

Content validity is a measure of how well test items represent the knowledge that the test purports to measure. A test with a high degree of content validity is a test for which high test performance serves as an index of a high degree of skill or knowledge in the area which the test purports to measure.

Construct validity is a measure of how well test items correlate to the theory or constructs behind the test. This assessment indicates the relationship between the theory behind the test and actual test performance. This assessment is probably the most difficult to conduct, since it may be difficult to identify the constructs upon which a test is built and because a statistical analysis of the interrelationship of test items may be required.

The figures on the following page summarizes the more stringent requirements for validity and reliability that attend tests used for high school graduation as compared to those having less definitive effects on students.

MEASUREMENT REQUIREMENTS OF COMPETENCY TESTING EFFORTS DIRECTED AT VARIOUS USES OF THE TEST DATA

Uses of Competency Test Information	Costs of False Positive	Costs of False Negative	Who Is Tested?	Validity	Reliability Accuracy and Precision	Importance of Test Security (1 - 3)	Appropriateness of Opportunity for Longitudinal Analysis
High School Graduation	Student leaves school without demonstration of required competencies. If prevalent, continued loss of confidence and support by the community.	Student wrongly denied diploma. Possible discouragement and loss of self respect and confidence. Either will get no diploma or will spend additional time in school unnecessarily.	All students, preferably well before 12th grade and with adequate preparation.	Curricular, instructional, face & content validity essential. Demonstrated predictive validity very desirable.	Must be high. Accordingly the number of items for each competency must be high, as must be item quality and difficulty appropriateness.	Absolute (3)	Normally one trial unless fail on first attempt.
Grade Promotion	Student advanced to next grade with insufficient knowledge and skills to benefit from instruction at that level.	Student wrongly denied promotion. Possible discouragement and loss of self respect and confidence. Left in an instructional level below his or her capabilities. Loss of time.	All students in grades selected.	Ditto the above, but the requirements are not quite so stringent.	Ditto the above, but the requirements are not quite so stringent.	Very Important (2)	Normally one trial.
Student Progess Assessment and Identification & Diagnosis of Students Needing Remediation (e.g., Grouping, Placement, Individualized or Personalized Instruction.)	Student fails to receive needed help. Nevertheless, this will most likely be remedied by the professional judgment of the staff working with the student, or, at worst, by the next round of testing.	Student put into remediation program unnecessarily. Possible discouragement and loss of self respect. Placed in an instructional program below his or her capabilities. Loss of time.	All students selected.	Again, same as above, but with some further relaxation of the minimum requirements.	Again, same as above, but with some further relaxation of the minimum requirements.	Important (1)	Initial decision may be revoked by follow-up testing and observation.
Program Evaluation and Improvement (also Policy Formulation, Resource Allocation, etc.)	Program rated more highly than it deserves. Possibly not terminated, curtailed, or modified as it should be.	Program rated less highly than it deserves. Possibly terminated, curtailed or modified incorrectly.	Random or stratified sampling possible and desirable. Also multimatrix approaches can be used to reduce individual testing time.	The requirements here depend to some extent on the role that such data play in decisions about programs, etc., (and vice-versa)!	The requirements here depend to some extent on the role that such data play in decisions about programs, etc. (and vice-versa)!	Very Important (2)	Longitudinal trend analysis most important and useful.
Comments	The legal implications are not developed here. There has been litigation suggesting that both false positives or false negatives can lead to legal suits.			Competencies outside the basic skills areas may require measurement by other means than paper-pencil tests, e.g., applied performance testing.		Security must be viewed from both a staff and student perspective.	

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THE MATCH BETWEEN THE TESTS AND INSTRUCTION

In judging the fairness of minimum competency testing, the match between the test and what is actually taught is of particular importance. McClung suggests that traditional notions of content validity should be expanded to include the concept of "instructional validity." In other words, the validity of a minimum competency test should be established in part by examining the relationship between test items and instruction actually received by students. If a test measures outcomes never taught in school, it may violate substantial due process, because the school, rather than the students, is at fault and the students are being punished without being personally guilty.

Most people would agree that fairness requires that a school's curriculum and instruction be matched in some way with whatever is later measured by the test. The test would be unfair if it measured what the school never taught. This concept is not included in the APA Standards, but is of primary importance in considering the validity of any competency test.

Curriculum validity is a measure of how well test items represent the objectives of the curriculum to which the test-takers have been exposed. It would also seem appropriate to demand of any competency test another type of validity, which might be termed instructional validity. Even if the curricular objectives for the school correspond with the competency test objectives, there must be some measure of whether or not the school district's stated objectives were translated into topics actually taught in the district's classrooms. Test items should measure topics taught. If test items do not reflect actual content of instruction, then the competency test should not be used as a high school graduation requirement for individual

students, but rather as a general survey instrument to be employed in curriculum planning and development. While a measure of curriculum validity is a measure of the theoretical validity of the competency test as an instrument to assess the success of students, instructional validity is an actual measure of whether the schools are providing students with instruction in knowledge and skills measured by the test. Thus, an analysis of the instructional validity of a competency test would require a comparison of the test items and objectives with actual course offerings in the school district.

In an analogous case, the Fifth Circuit held that a school board regulation violated substantive due process because it allowed school children to be suspended for their parents' misconduct:

> [T]he children do not complain that they were denied the constitutional right to an education, but that they were punished without being personally guilty. Thus, a cardinal notion of liberty is involved and substantive due process is applicable (St. Ann vs. Palisi, 495 F.2d 423, 426 [5th Cir., 1974]).

Since the practice established "a significant encroachment upon a basic element of due process," the Court required the school to meet "a substantial burden" to justify this encroachment, including proof that reasonable alternative means to achieve the stated objective were not available.

DEBRA P. VS. TURLINGTON - A KEY CASE

A recent key Florida case that draws together elements of all the legal problems previously identified is Debra P. vs. Turlington, No. 79-3074 (5th Cir., 1981). In this case, a Florida statute was attacked that conditions

receipt of the high school diploma on students' "demonstrated ability to successfully apply basic skills . . . as measured by a functional literacy examination."

In the first administrations of the Florida tests, black students failed at almost 10 times the rate of whites. Black and white students jointly sued the state in a class action in 1979, charging that the use of the test scores to grant or withhold diplomas violated 14th amendment guarantees of equal protection under the laws. District Court Judge George Carr enjoined the use of the scores as a diploma requirement until the 1982-83 school year (474 F. Supp. 244-M.D. Fla. 1979). He held the test to be discriminatory until graduating students have had all their education in desegregated schools. Moreover, he cited the lack of "prior and sufficient notice" as a failing of the program. He did, however, find the test itself to be valid.

Both sides appealed Judge Carr's findings. The 5th Circuit affirmed the injunction and sent the case back to the District Court for a reconsideration of the test's validity. Carr had found the test to be valid because its content matched the state's published goals. The 5th Circuit Court disagreed and held instead that in order for a graduation test to be valid, students must actually have been instructed in the content on which they are tested. The Appeals Court placed the burden of proof of such required "instructional" validity on the state. Issues left to be resolved include the extent to which the test and prior instruction must be in agreement and whether the state must prove that each student it wishes to deny a diploma has been satisfactorily instructed. That the latter may well be the case is indicated by the fact that the court held that each student, having attended school as required by law, has a property interest in the expectation of a diploma. If this Florida

5th Circuit position on the issue of proof of the validity of minimum competency graduation tests prevails, the cost of bearing the requisite burden of proof may be so great that in this time of constricted resources, state and local systems may abandon such programs.

CONCLUSION

This paper has reviewed the five key approaches to legal challenges of minimum competency graduation programs. By focusing test development and instructional support efforts on building tests that are fair and non-discriminatory, adequately phased-in, technically superior, and well geared to instruction, districts can serve students and their parents better and can avoid spending time in court which is better spend pursuing their mission of educational excellence for all children.

NOTES

1. Oregon is one of the states which requires "demonstration of basic skills competency" as a condition of graduation, but leaves it up to the local districts to decide whether test scores or some other form of evidence such as teacher judgment will be used to certify competence in the required areas.

2. See, e.g., State vs. Ghrist, 270 H.W. 376 (Iowa 1936); State vs. Board of Education of the City of Antigo, 172 H.W. 153 (Wis. 1919); Cameron vs. Lakeland Class "A" School District, Kootenai County, 353 P 2d 652 (Ida. 1960)

BIBLIOGRAPHY

Airasean, Peter W., Madaus, George F. and Pedulla, Joseph J. (Eds), Minimal Competency Testing, Educational Technology Publications, Englewood Cliffs, New Jersey. 1979.

Bailey, Stephen et al. "Improving Educational Achievement," National Academy of Education, April 1978.

Clark, James P. and Thompson, Scott. Competency Tests and Graduation Requirements, National Association of Secondary Schol Principals, Reston, Virginia. 1976.

Gadway, Charles I. and Wilson, H.A. "Functional Literacy Basic Reading Highlights," National Right to Read Effort and National Assessment of Educational Progress, Denver, Colorado. 1976.

Hathaway, W. E. "A School District Developed: Rasch Based Approach to Minimum Competency Achievement Testing". In Minimum Competency Achievement Testing, Richard M. Taeger and Carol Kehr Tuttle, eds. McCutchen, 1980.

Hathaway, W. E. "Competency Categories and Competencies in CBE Programs," AERA Regional Conference on Competency and Control in Education, Portland, Oregon. October 1977.

Hathaway, W. E. "Competency Based Education: The Oregon Model," Annual Association for Supervision and Curriculum Development Conference, Houston Texas. March 1977.

Hathaway, W. E. "Competency Based Education: The Oregon Approach," American Association for School Administrators Annual Convention Las Vegas, Nevada. February 1977.

Hathaway, W. E. "Secondary Education/Competency Based Education: The Oregon Experience," ACT Conference on Competency Based Education, Eugene, Oregon. February 1977.

Hathaway, W. E. "Competency Based Education: Definitional Issues and Implications for Cooperation Across Educational Institutions and Level," Council of Chief State School Officers Study Commission, Competency Based Education Conference, Denver, Colorado. July 1976.

Hathaway, W. E. Educational Reform: The Role of Competency Based Education (editor and contributor). Proceedings of a conference sponsored by the State Commission of the Council of Chief State School Officers. Northwest Regional Educational Laboratory, Portland, Oregon. July 1976.

Hathaway, W. E. "Decentralized Minimum High School Graduation Requirements in the Context of Competency Based Education - The Oregon Approach," The 6th Annual Conference on Large-Scale Assessment, Boulder, Colorado. June 1976.

Hathaway, W. E. "A Model for the Evaluation of Statewide Educational Reform: The Oregon Competency Based Education Program," American Educational Research Association, San Francisco, California. April 1976.

McClung, Merle "Are Competency Testing Programs Fair? Legal?" Phi Delta Kappas. February 1978.

McClung, Merle "Competency Testing: Potential for Documentation", Chapter Nine in Minimum Competency Testing.

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